IN THE

upreme Court of the United States

October Term, 1972

No. 72-269

THUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Appellants,

and

THEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, ochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH CHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR IRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn, ew York,

Appellants,

and

EARL W. BRYDGES, as Majority Leader and President *Pro Tem* of the New York State Senate,

Appellant,

against

MMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLD-OVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD SQUADRON,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

TATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANTS LEVITT AND NYQUIST

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANTS LEVITT AND NYQUIST

The appellants Arthur Levitt and Ewald B. Nyquist, pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

Opinions Below

The opinion of the majority of the Judges in this case, sitting as a statutory Court of three Judges, written by the Hon. MORRIS LASKER, Judge of the United States District Court for the Southern District of New York, and concurred in by the Hon. PAUL R. HAYS, Associate Judge of the United States Court of Appeals for the Second Circuit, sustained the complaint, held Chapter 138 of the New York Laws of 1970 to be unconstitutional, and enjoined the further implementation of the statute by the defendants Levitt and Nyquist. The Hon. EDMUND PALMIERI, Judge of the United States District Court for the Southern District of New York, dissented in a separate opinion. The majority opinion, the dissenting opinion and the final judgment appealed from are set out in the Appendix hereto and marked as Appendix "A", "B", and "C" respectively. There is as yet no citation of this opinion.

Jurisdiction

The appeal herein is from a final judgment made and entered in the United States District Court for the Southern District of New York by a specially constituted three-judge panel convened therein under 28 United States Code,

Sections 2281 and 2284. The judgment holds Chapter 138 of the New York Laws of 1970 to be unconstitutional on the ground that it violates the Establishment Clause of the First Amendment to the Constitution of the United States, and enjoins the defendants Levitt and Nyquist from making payments under that Chapter to nonpublic schools in the State.

The complaint sought declaratory and injunctive relief against Chapter 138, alleging that the statute violated the Establishment Clause by providing payments to nonpublic schools in the State as partial reimbursement to the schools of the cost of providing testing and record keeping services to the State, as required by State law or regulation.

The final judgment granting the relief sought in the complaint was made and entered June 1, 1972. Notice of Appeal on behalf of defendants Levitt and Nyquist was filed on June 19, 1972 in the United States District Court for the Southern District of New York (a copy of which is made Appendix "D" hereto). Notices of Appeal were also filed on behalf of intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School on June 30, 1972, on behalf of intervenor-defendant Earl W. Brydges on July 1, 1972, and on behalf of Bais Yaakov Academy for Girls and Yeshivah Rambam on July 10, 1972.

The Supreme Court of the United States has jurisdiction to review by direct appeal the final judgment above cited pursuant to the terms of 28 United States Code, Section 1253.

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Flast* v. *Cohen*, 392 U. S. 83

[1968]; *Board of Education* v. *Allen*, 392 U. S. 236 [1968]; *Lemon* v. *Kurtman*, 403 U. S. 602 [1971]; and *Tilton* v. *Richardson*, 403 U. S. 672 [1971].

Statute Involved

Chapter 138 of the New York Laws of 1970, provides as follows in pertinent part (the full text is set out as Appendix "E" to this statement):

> "Section 1. It is hereby determined and declared as a matter of legislative finding:
>
> "That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.
>
> "That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.
>
> "That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.
>
> "Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

"§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

"a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

"b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

* * *

"§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

"§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law [which prohibits discrimination in pupil enrollments]."

Question Presented

Does the partial reimbursement of nonpublic schools for costs of record keeping and testing violate the Establishment Clause of the First Amendment to the Constitution of the United States where the records are kept and the

tests administered pursuant to requirements of State law and regulation for the purpose of determining whether or not the nonpublic schools are complying with the State's compulsory attendance laws, both in terms of attendance of pupils and in accordance with the requirement that such nonpublic schools provide an acceptable minimum standard of education to the pupils so enrolled?

Statement of the Case

Plaintiffs, suing on behalf of themselves and their children, commenced this action seeking to have Chapter 138 of the New York Laws of 1970 declared unconstitutional, alleging that it violates the First Amendment to the Constitution of the United States. Plaintiffs also alleged that the statute violates Article XI, section 3, of the New York Constitution, which prohibits the expenditure of public moneys to or in aid of sectarian schools, except for examination and inspection. The complaint also sought an injunction restraining the implementation of the law, insofar as it provides money for sectarian schools.

A motion was made by the defendants seeking dismissal of the action on several grounds, among which were that the complaint failed to state a claim upon which relief could be granted, and dismissal of the complaint as to one defendant, Nelson A. Rockefeller, on the ground that the complaint sought no relief against that defendant and that he had no power or responsibility in the administration of the law. The latter part of the motion was granted by the District Court (Lasker, J.). Defendants also sought dismissal of the action on the ground that the complaint raised a threshold question of validity of the statute under the Constitution of the State of New York and that that question should be determined in State Courts prior to the

commencement of a Federal Court proceeding. That application was denied.

A motion to intervene in the action was made by a group of nonpublic schools which are beneficiaries of payments under the act. The motion was granted.

Subsequent to the granting of an order for the convening of a three-judge District Court, interrogatories were served by intervenor-defendants on the plaintiffs and by plaintiffs upon defendants and intervenor-defendants. The answers to those interrogatories are exhibits to the record in this case.

The District Court, in its decision, found the New York statute to be unconstitutional under the Federal constitutional provisions and did not rule on the contentions made as to constitutionality under the State constitutional provision. The Court based its decision upon the recent decisions of this Court in *Lemon* v. *Kurtzman* and *Early* v. *DiCenso* (403 U. S. 602). The Court found that the nature of the aid provided under the New York statute is the same as that provided under the Pennsylvania act in *Lemon*, that is, "financial assistance paid directly to the church-related school." The Court found inapplicable any analogy to bus transportation, school lunches or textbooks as "secular, neutral, or nonideological" services, on the basis that the greatest proportion of the funds are payable as reimbursement for administration of tests and that testing "is an integral part of the teaching process." An actual or potentially excessive entanglement between government and religion was also found by the Court, as was a potential for "aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation".

The dissenting District Judge (PALMIERI, J.) would have found the statute to be a "legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law." Judge PALMIERI's opinion pointed to the fact that the statute provides for only a fractional reimbursement of the cost of record keeping and testing required of nonpublic schools by State law and regulation. The dissenting opinion further observed:

> "A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton* v. *Richardson*, 403 U. S. 672, 678 (1971), that
>
> > 'candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication'
>
> and that '[j]udicial caveats against entanglement' are a 'blurred, indistinct and variable barrier.' "

The dissenting judge would have found that reimbursement for testing and record keeping constituted payment for a neutral, secular and nonideological purpose, and was, thus, constitutional.

Subsequent to the entry of judgment a motion was made on behalf of the Majority Leader of the New York State Senate, Earl W. Brydges, for leave to intervene as a defendant. That motion was granted. Motions for a stay of the injunction pending appeal to this Court were also made and were denied.

The Question is Substantial

Over a period of years, this Court has considered the question of what form of payments or aid may be provided to nonpublic schools or to children enrolled in them. The Court has held that school bus transportation may be provided to children attending sectarian schools (*Everson* v. *Board of Education*, 330 U. S. 1); that textbooks may be provided to children attending church-related schools (*Board of Education* v. *Allen, supra*); that public moneys may be spent for the construction of academic buildings at church-related colleges (*Tilton* v. *Richardson, supra*); and has also held that payments may not be made either to schools or to individuals for the cost of teaching or teachers' salaries (*Lemon* v. *Kurtzman, supra*). None of those cases have involved the precise question here at issue, that is, whether the State, having mandated that nonpublic schools keep certain records and administer certain tests to determine whether or not the children enrolled in those schools are receiving a full-time and adequate education, may reimburse those schools for all or a part of the cost of those record keeping and testing services.

This Court has never had occasion to rule upon whether the State which imposes administrative burdens upon nonpublic schools may also alleviate those burdens by reimbursing the schools for all or a part of the costs thus imposed.

New York State has set minimum standards of educational quality through the requirements of various sections of the Education Law, such as the provisions of Article 17 thereof, which require certain subjects to be taught in nonpublic as well as in public schools, and the provisions of sections 3204 and 3210 of the Education Law, which require that the educational offerings of nonpublic schools

must be "at least substantially equivalent" to that of the public schools in the pupil's district of residence. Furthermore, subdivision 2 of section 305 of the Education Law, which provides for the general powers of the Commissioner of Education, states that he shall have the general supervision over all schools and institutions which are subject to the provisions of the Education Law or of any statute relating to education and that he must cause all these schools to be examined and inspected.

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the Education Department, such as the Regent's examinations, the so-called "PEP Tests" (Pupil Evaluation Program) in grades 3, 6 and 9, as well as other testing devices which require the results of such tests to be reported to the Education Department. These measuring devices are used in relation to both public and nonpublic school pupils.

In addition, various reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of making sure that the minimum State educational standards are maintained throughout all the schools in the State, both public and nonpublic alike (see defendant Nyquist's answer C-2 to plaintiffs' Interrogatories, and Exhibit E attached thereto).

The expressed purpose of Chapter 138, as set forth in the first section of the Act, is to insure, through examination and inspection, that the young people of the State enrolled in nonpublic schools are attending upon instruction as required by law and are maintaining levels of achievement which will adequately prepare them for "the challenges of American life in the last decades of the twentieth century."

The expressed purpose of the statute is further to compensate the nonpublic schools for the services mandated by State law or by regulation of the Commissioner of Education as set forth above. The sum of $28,000,000 has been appropriated for payments for this purpose to be made in each fiscal year since the enactment of the law.

In April, 1970, a background informational study was done in relation to Chapter 138 and is attached as Exhibit F to the answers of defendant Nyquist to plaintiffs' interrogatories. That study, in three pages, lists the different types of record keeping and testing performed by the nonpublic schools pursuant to law or regulation.

Subsequent to the enactment of Chapter 138, another study was prepared by three research consultants, each operating independently, analyzing the cost of the mandated services for which compensation is made pursuant to Chapter 138. It concluded that the $28,000,000 specified in the law for the mandated services compensation is justified on the basis of the actual costs to the schools in performing those services. This report is attached to defendant Nyquist's answer to plaintiffs' interrogatories as Exhibit D. In all cases, the amount expended either in the school as a whole or on a per pupil basis was found to be substantially greater than the amount of compensation received from the State for those services. For example, it was found that the average per pupil cost for mandated services is $82.50 per year, as contrasted with the Chapter 138 formula of $27.00 per pupil at the elementary level and $45.00 per pupil at the secondary level.

In October, 1971, a study of the costs of administration of only three required tests was made and submitted to the Regents (Exhibit G to defendant Nyquist's answers to

plaintiffs' interrogatories). That study showed that those three tests alone cost the nonpublic schools on the average of $19.00 per pupil. That study also concluded that the per pupil allocation of Chapter 138 was justified on the basis of the actual costs of the services provided.

As stated in the dissenting opinion of the Court below, New York's educational system has been, for purposes of supervision at least, a unitary one for many years, ever since the initial creation of the Board of Regents early in the nineteenth century.

New York's legislative history clearly shows the incorporation of nonpublic schools within the State's ambit of educational concern. For example, in the State of New York nonpublic schools are chartered by the Board of Regents (Education Law, § 216). There is regular inspection by the Education Department of the nonpublic as well as the public schools (Education Law, § 305[2]). Nonpublic schools are exempt from taxation (Real Property Tax Law, § 420). Attendance at a nonpublic school complies with the State's compulsory education law (Education Law, § 3204) and satisfies the requirement for part-time attendance (Education Law, § 4601). Terms of attendance in the nonpublic as well as the public school are prescribed (Education Law, §§ 3204-3205), and certain curriculum requirements are imposed (Education Law, §§ 3204, 801, 803, 806-808, 3002).

The State has not only imposed these requirements on the nonpublic schools but it has also recognized the importance of insuring that these requirements are complied with by both sectarian and nonsectarian nonpublic schools. In furtherance of that interest, an exception was incorporated into the New York State Constitution's pro-

hibition against the use of public moneys in aid of denominational schools, authorizing the use of public moneys "for examination or inspection" (Article XI, § 3).

It has long been recognized both legislatively and judicially, that the First Amendment to the Constitution of the United States does not prohibit all contact between government and religion. Federal funds for missionaries to the Indians were first paid under President Washington and continued until 1900 when changed conditions on the reservations, not constitutional problems, resulted in a change in the system. The First and Third Congresses, also under Washington, created the military chaplaincies for which Federal funds are still being paid. Under every Congress there have been chaplains in the House and Senate and in Federal institutions, such as hospitals and correctional institutions, and religious services are held at the United States military academies. Sectarian property and income is tax exempt; clergymen and divinity students have been made exempt from the draft, as are conscientious objectors; the Bible is used for administering oaths; NYA and WPA funds were available to both public and sectarian schools during the depression period; religious organizations are given special postal privileges; and hospitals owned by religious organizations are eligible for aid under the Hill-Burton Hospital Construction Act (Hill-Burton Act of 1946, 60 Stat. 1040, 42 U. S. C. §§ 29-92).

Many other Federal statutes have provided nondiscriminatory aid to students attending both public and nonpublic schools, both directly and through the institutions they attend. Among these are the National School Lunch Act (60 Stat. 230 [1946], 42 U. S. C. § 1751), free milk under the Agriculture Act of 1949 (63 Stat. 1051 [1949], 7 U. S. C. § 1431), the National Defense Education Act of 1958

(72 Stat. 1580 [1958], 20 U. S. C. §§ 401-589), College Housing Act of 1950 (12 U. S. C. §§ 1749-1749c), the Higher Education Facilities Act (77 Stat. 363 [1963], 20 U. S. C. §§ 701-757, *Tilton* v. *Richardson*, 403 U. S. 672 [1971], the Higher Education Act (79 Stat. 1219 [1965], 20 U. S. C. §§ 1001-1144), the Elementary and Secondary Education Act (79 Stat. 27 [1965], 20 U. S. C. §§ 236-244, 331-332), the Surplus Property Act of 1944 which, as of 1961, had resulted in 488 grants of land and buildings to church-related schools of 35 denominations (58 Stat. 765 [1944], 40 U. S. C. §§ 484 (j) and 484(k); 107 Cong. Rec. 17351), and the G. I. Bill of Rights (66 Stat. 663 [1952], 38 U. S. C. § 911).

From this listing we must assume that either the Congress and the Presidents have been totally wrong under the Constitution or that the First Amendment prohibition of an establishment of religion does not bar nonpreferential aid to all schools, all pupils, or all institutions, regardless of their religious affiliation.

Probably the most often quoted case, on both sides of the establishment argument, is the *Everson* case (*Everson* v. *Board of Education*, 330 U. S. 1 [1947]). In that case, this Court held that the nonpreferential provision of school bus transportation for children attending both public and nonpublic schools did not constitute aid to or an establishment of religion. In so holding, the Court, in an opinion by Mr. Justice Black, clearly set forth the purpose and intent of the Establishment Clause, stating (pp. 15-16):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from

> church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."

The common denominator in all the activities there stated to be prohibited is that the law, activity, or tax must be directed to the aid of religion as such. That decision did not declare to be prohibited general public programs not intended or directed to the aid of religion which, by the fact that they incidentally aid adherents to a particular religion or to all religions, also incidentally or collaterally aid the religion.

Of greatest importance in demonstrating the substantiality of the question here involved are the decisions of this Court in *Lemon* v. *Kurtzman, supra,* and *Tilton* v. *Richardson, supra,* as the latest examination by the Court of questions under the First Amendment. An analysis of those decisions clearly shows that the program enacted by Chapter 138 is not prohibited under the decisions of this Court and is, in fact, a valid, constitutional program of the State and that the question here raised is, thus, substantial and should be considered by the Court.

In the *Lemon* case, this Court was confronted with two statutes, one of which provided a subsidy for the payment of teachers' salaries in nonpublic schools and the other provided compensation for the teaching of certain secular subjects in nonpublic schools. In *Tilton,* the Federal Higher Education Facilities Act, providing for the construction of college academic buildings, was involved.

Examining the statutes in those cases, this Court observed in *Lemon* (612):

> "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation [between constitutionality and unconstitutionality] in this extraordinarily sensitive area of constitutional law."

and again (614):

> "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."

In *Tilton*, the Court repeated the statement first above quoted as applicable to that case as well (678).

The tests of constitutionality were stated in *Lemon* as being (612-613):

> "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz* v. *Tax Commission*, 397 U. S. 664, 668 (1970).
>
> * * *
>
> "* * * Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz, supra*, at 674."

In *Tilton*, this Court also said (679):

> "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In applying those tests, the Court observed in *Lemon* (615):

> "In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."

In the instant case, while the character and purposes of the institutions benefited may be the same as those in *Lemon*, the nature of the aid provided and the resultant relationship between government and religion are vastly different.

This Court in the *Tilton* and *Lemon* cases recognized that the State has certain legitimate concerns which establish a legitimate area of contact with sectarian schools, and that certain types of aid are by their nature constitutional even though they may provide some indirect benefit to the sectarian mission of the schools. In that regard, the Court said in *Lemon* (613):

> "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."

and again (614):

> "Fire inspections, building and zoning regulations, and state requirements under compulsory school attendance laws are examples of necessary and permissible contacts."

In that regard, it should be noted that Chapter 138 is directed, in part, to assuring compliance with the compulsory school attendance laws of the State.

Further, in *Lemon,* this Court *also* observed (616-617):

> "Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or non-ideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

In the instant case, defendants contend that the aid involved is secular, neutral and non-ideological. It compensates the schools for record keeping required by the State in enforcing the compulsory attendance laws and statutes and regulations requiring minimum course standards and for the administration of State required tests. Those tests are designed by the State and are the same tests provided by the State to public as well as nonpublic schools and thus are both secular and non-ideological in nature.

The statute here in question does not involve the State in the actual educational process of the private schools. It does no more than compensate the private schools, sectarian and nonsectarian alike, for the expense of record keeping and administration of examinations necessary to assure that those schools are maintaining that quality of secular education necessary for the young people of the State.

It is necessarily a secular purpose and intent to see that children attending nonpublic schools comply with the compulsory attendance laws of the State, that they are receiving an adequate education from qualified teachers, and that they are tested in accordance with State standards of academic achievement.

The issues here raised and the statute here involved have not been considered by this Court in any prior decision.

The question of a State's ability to reimburse schools for the cost of mandated services to the State is substantial, both in terms of the extent of the State's ability to require such services and of the ability of the schools to provide such services, as well as in terms of the right to reimburse the schools for all or a part of the cost of those services.

CONCLUSION

Appellants respectfully pray that this Court note probable jurisdiction in this cause and place the case upon its calendar for argument.

Dated: August 16, 1972.

Respectfully submitted,

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APPENDIX "A"

Majority Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION and RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenor-Defendants.

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70 Civ. 3251.

Before: Hays, *Circuit Judge,* Palmieri and Lasker, *District Judges.*

Appearances:

Leo Pfeffer, 15 East 84th Street, New York, N. Y. 10028, Attorney for Plaintiffs.

Louis J. Lefkowitz, Attorney General of the State of New York, Capitol, Albany, New York, Attorney for Defendants Levitt and Nyquist. Of counsel: Ruth Kessler Toch, Solicitor General and Jean M. Coon, Assistant Solicitor General.

Davis, Polk & Wardwell, 1 Chase Manhattan Plaza, New York, N. Y. 10005, Attorneys for Intervenor-Defendants Cathedral Academy, St. Ambrose School, and Bishop Loughlin Memorial High School. Of counsel: Porter R. Chandler, Richard E. Nolan and James W. B. Benkard.

Julius Berman and Marcel Weber, New York, New York Attorneys for Intervenor-Defendants, Bais Yaakov Academy for Girls and Yeshivah Rambam.

LASKER, *D. J.*

We are called upon to determine the constitutionality of Chapter 138 of New York State's laws of 1970, which appropriates $28,000,000 to be paid to nonpublic schools for expenses incurred in complying with requirements of state law of which the principal are the testing of pupils and maintenance of attendance and health records.[1]

In 1970 there were 850,000 students nonpublic schools in New York. Chapter 138 includes the following legislative finding:

> "That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

[1] The appropriation is to be paid to nonpublic schools "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." (Chap. 138 of the Laws of 1970).

"That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

"That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs."

Plaintiffs are taxpayers of New York and an unincorporated association whose members are New York residents whose objectives include opposition to use of public funds for the support of sectarian or religious schools. Defendants are the Commissioner of Education, who administers the statute, and the State Comptroller, who makes payment of the appropriated funds. Intervenors are Catholic and Jewish parochial schools who are beneficiaries of the Act.

The record contains defendants' and intervenors' answers to plaintiffs' interrogatories. No factual disputes exist.

Plaintiffs sue to enjoin the enforcement of the statute. Defendants move for judgment, claiming that the statute violates neither the federal nor the state constitution, and to dismiss the complaint on the ground that it raises a threshold question of violation of the constitution of the State of New York.

I.

The statute, which became effective July 1, 1970, directs the Commissioner of Education to apportion annually

to nonpublic schools the sum of $27 for each pupil in average daily attendance in the first six grades and $45 for those in grades seven through twelve. The express purpose of the expenditure, as indicated above, is to compensate the schools for services "mandated" by state law or regulation of the Commissioner. These services include administration of compulsory attendance laws, Regents' examinations, and pupil evaluation program tests, as well as preparation of various reports intended to assure that minimum state educational standards are met. The services rendered are required of public and nonpublic schools alike.

The Act is construed and applied by the defendants to include as permissible beneficiaries school which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7).[2]

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[2] It should be pointed out that intervenors Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not impose religious restrictions on admissions or require attendance of pupils at religious activities or obedience by students to the doctrine of a particular faith; that the schools contribute to the religious mission of the sponsoring church, but they do not impose religious restrictions on faculty appointments and they place restrictions on teaching only to the extent that it not be contrary to the tenets of the sponsoring church. (Intervenors' Answers to Interrogatory 3.)

The beneficiary schools are required neither to account for nor return to the state any amounts received by them in excess of their actual expenditures for "mandated services." (Answers to Interrogatories 4, 7 and 11). This, of course, leaves a school free to expend any excess for whatever purpose it wishes, including religious or sectarian objectives.

Since the statute is predicated—and its constitutionality allegedly justified—on the ground that it merely reimburses the nonpublic schools for expenses of state-mandated services, post-enactment studies have been conducted comparing the actual cost to the schools of performing services with the amounts allocated to them by the state. The conclusions to be drawn from such reports (Exhibit D to Defendant Nyquist's Answers to Plaintiffs' Interrogatories) are cloudy. If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses. Doubt as to which standard is properly applied is occasioned by material submitted by the Commissioner to the Board of Regents at its request which states (Exhibit G to Defendant Nyquist's Answers to Interrogatories, at p. ES 1.9):

> ". . . only the Regents Scholarship and January and June Regents Examinations might be regarded as *specifically mandated*. Inclusion of such costs only would reduce the examination figure [of $68,853] by $66,629." (Emphasis in original).

While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or indeed, whether they can be regarded as specifically "mandated."

Plaintiffs contend that on its face, and as applied, the statute violates the establishment clause of the First Amendment to the federal constitution, as well as Article 11, section 3, of the New York constitution, because its purpose and primary effect is to advance religion and it gives rise to excessive governmental involvement and entanglement in religion.[3]

Defendants and intervenors argue that the statute is constitutionally justified since payments are made solely as reimbursement for the expenses of furnishing secular services mandated by the state. They contend that the Act constitutes neither sponsorship, financial support, nor active involvement in religious activity by the state and does not cause excessive entanglement of church and state. They also claim that, aside from the merits, the complaint should be dismissed for "lack of jurisdiction"[4] because the

[3] Plaintiffs also allege that the statute constitutes compulsory taxation in aid of religion in violation of the free exercise clause of the First Amendment. In view of that rationale by which we dispose of the case, it is unnecessary to consider this argument.

[4] Defendants state the position in their brief as follows:

"The complaint should be dismissed on the ground that the Court lacks jurisdiction over the subject matter of the action in that the complaint raises a threshold question of the constitutionality of the statute under the provisions of the constitution of the State of New York."

We assume that defendants wish us to apply the doctrine of abstention, since it is clear that the Court has jurisdiction of the First Amendment issue.

complaint raises a threshold question under the constitution of New York. This contention was exhaustively treated and rejected by the convening judge (*Committee for Public Education and Religious Liberty, et al.*, v. *Rockefeller, et al.*, 322 F.Supp. 678, 687 (S.D.N.Y. 1971)). We agree with his view that neither abstention nor dismissal for the reason suggested is appropriate here. The federal and state issues are of equal importance. The statute is unambiguous on its face, and under the rule of *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), the court should "proceed to the federal constitutional claim." Furthermore, abstention is particularly unsuitable in this case because, as indicated in the convening judge's opinion (322 F.Supp. at 688), plaintiffs have no standing under New York law to litigate the state constitutional question in the New York courts. We are unimpressed by the proposal in the states' brief that we should abstain because "there is no assurance that that Court [*i.e.*, Court of Appeals of New York] would not now reverse the position that it took in earlier cases . . ." in the light of the holding in *Flast* v. *Cohen*, 392 U.S. 83 (1967), that a federal taxpayer has standing to sue for constitutional violations. Nothing in the New York Court of Appeals' decisions since *Flast* encourages or supports the state's argument on this point.

II.

We come to the federal constitutional question. We are guided so clearly by the decision of the Supreme Court last term in *Lemon* v. *Kurtzman* and *Earley* v. *DeCenso*, 403 U.S. 602 (1971), that we need not review at length earlier cases which articulated constitutional limits on govern-

mental assistance to church-supported schools. The boundaries of permissible government action in the field were set by *Everson* v. *Board of Education*, 330 U.S. 1 (1947), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968). In *Everson*, the Court upheld a New Jersey statute which reimbursed *parents* for bus fares of children attending parochial schools. However, the *Everson* Court cautioned that its decision carried to "the verge" of what Chief Justice BURGER, in *Lemon*, described as the "forbidden territory under the Religion Clauses." In *Allen*, the Court found that a New York law under which the state loaned school books to *students* at parochial schools passed constitutional muster. Neither case involved a statute which, as here, grants direct subsidies to parochial schools; and in *Lemon* the Court struck down two such plans.

The *Lemon-Earley* decision dealt with Pennsylvania and Rhode Island statutes which, as here, provided for cash payments intended to assist parochial schools in the acknowledgedly grave financial crisis which faces them. The Rhode Island statute, resting on a legislative finding that the quality of education available in nonpublic schools was jeopardized by rising salaries needed to attract teachers, authorized state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by direct limited payment to the teacher. The teacher was bound to teach only subjects and use only teaching materials offered in public schools, and not to teach any course in religion. Eligible schools were required to submit to the state financial data necessary to determine the propriety of payments under the Act. The Pennsylvania statute, also based on a legislative finding of rapidly

rising costs in the state's nonpublic schools, authorized the Superintendent of Public Instruction to "purchase" "secular educational services" from nonpublic schools. The purchase was consummated by state reimbursement to nonpublic schools of actual expenses for teachers' salaries, text books and materials. To secure reimbursement, a school was required to follow specified accounting procedures subject to state audit. Reimbursement was limited to such secular courses as mathematics, foreign languages, physical science, and physical education, and prohibited courses that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

From this analysis it is apparent that the New York statute before us more closely resembles the Pennsylvania than the Rhode Island statute, and our decision is guided by the Supreme Court's observations as to the former. Indeed, the sole differences of substance which exist between the Pennsylvania statute and New York's mandated services law are that reimbursement was permitted under the Pennsylvania law principally for teaching, whereas here it is allowed primarily for testing; and under the Pennsylvania statute a school was required, subject to audit, to account to the state, while here the school is not. We find these distinctions insufficient to avoid the rule of *Lemon-Earley*, concluding, as did the *Lemon* Court, "that the cumulative impact of the entire relationship arising under the statute[s] . . . involves excessive entanglement between government and religion."

The *Lemon* Court's finding of excessive entanglement was based on an examination of the "character and pur-

poses of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon, supra,* at 615.

In the case at hand there is no question as to the character and purposes of the institutions which are benefited. No dispute exists as to the close association of the schools to the religious institutions of various faiths which support them. Indeed, the record establishes that payments are made to schools which, for example, impose religious restrictions on admissions, require attendance of pupils at religious activities, and are an integral part of the religious mission of the supporting church.

The nature of the aid provided here is precisely the same as the state aid provided by Pennsylvania in *Lemon*—that is, financial assistance paid directly to the church-related school. Even before its holding in Lemon that such payments violated the establishment clause, the Court had cautioned in *Walz* v. *Tax Commission,* 397 U. S. 664, 675 (1970):

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."

The defendants here contend that the rationals of *Lemon-Earley* and the quoted *Walz* passage are inapplicable to the New York statute, which does not require, either on its face or as administered, any "detailed administrative relationship for enforcement" of the statute. It is said that, since the New York law simply does not require benefici-

aries to report on their use of the funds, the vice foreseen in *Walz* and found fatal in *Lemon* does not exist here.

The argument is unpersuasive. As the *Lemon* Court commented:

> "The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." (at 621).

We think this lesson of history is applicable here. Indeed, the gentle inquiry of the Board of Regents which caused studies to be made to determine whether the costs to the nonpublic schools for mandated services are actually as great as the amounts they receive from the state is a sort of inching in that direction. It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the state is not paying for more than it is receiving. Indeed, section 8 of the statute itself states: "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction." It is diffiicult to see how the Board of Regents or the Commissioner can in good faith implement the language of section 8 without sooner or later instituting the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement.

Assuming, however, that such a prognosis is unfounded, the alternative leaves the statute even more vulnerable. For if no system of audit or control is to be instituted, this will leave the schools free, as they apparently are now.

to keep their shares of the apportioned money regardless of whether their expenses are as great as their receipts, and to use any excess for the general purposes of their religious missions. The dilemma we have outlined is insoluble. Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

Defendants argue that the strictures of *Lemon* and *Walz* against cash payments do not apply here because reimbursement is being made for services which are "secular, neutral, or nonideological" (*Lemon,* at 616) analogous to the payments which were approved in *Everson* and *Allen.* The analogy, however, is inapposite. Bus transportation, school lunches, public health services, and secular text books (for which payment was approved in *Everson, Allen* and other cases) are of a character entirely different from services rendered by teachers in administering tests not only developed by the state, but those developed by the schools or the teachers. By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon,* "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* and *Allen* inapplicable. Nor does the fact that the reimbursement by New York is for "mandated services" rescue the statute. It is true, of course, that administration of tests, recording attendance of students, and compiling health records are required by the state, but so is

teaching required by the state if a private school, parochial or otherwise, is to be certified as an adequate substitute for public school. It would be fanciful to suggest, however, that the state would be free to reimburse the schools for ordinary teaching expenses on the theory that the state "mandates" such services.

Even if all these observations were not true, the statute would nevertheless be constitutionally flawed. As the *Lemon-Earley* Court stated:

> "A broader base of entaglement of yet a different character is presented by the divisive political potential of these state programs." (at 622).

The Court held there that in a community with a large number of pupils served by church-related schools (surely true in the present case) it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation. The Court concluded (at 622) that " ... political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Measured by this standard, the New York statute suffers precisely the same constitutional defects as both the Pennsylvania and Rhode Island statutes in *Lemon-Earley*.

While we thus conclude that Chapter 138 violates the establishment clause of the First Amendment, it is proper for us to note our sympathetic awareness of the serious financial problems directly facing the parochial schools and, indirectly, the public. We recognize and appreciate the contribution which private schools have made financially and in providing that variety of approach to educa-

tion which enriches community life. But the First Amendment, which has for two centuries assured the individual's right to worship as he chooses, protected the church from the impositions of the state, and immunized the national community against the ills of religious-political divisiveness, must be our guiding star.

A permanent injunction against the enforcement of the statute will be granted. The defendants' motions are denied.

Submit order on notice.

Dated: New York, New York, April 27, 1972.

RICHARD R. HAYS, *C. J.*,

MORRIS E. LASKER, *D. J.*

APPENDIX "B"

Dissenting Opinion of PALMIERI, *D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants.

and

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York; and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenor-Defendants.

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70 Civ. 3251.

Before HAYS, *Circuit Judge,* PALMIERI and LASKER, *District Judges.*

Appendix "B"—Dissenting Opinion

PALMIERI, *J.*

I respectfully dissent. The statute under review is, in my opinion, a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. The private and parochial schools of New York State have been part of a single unitary system of education for many years and they have been under the jurisdiction of the Board of Regents since 1784.

I deplore the incalculable and irreversible harm which will be done by this decision. The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record keeping and testing by non-public schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such puposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.[1] It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of those

[1] This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation.

who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.

I am constrained to decline to participate in destroying this legislative act by judicial action. A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton* v. *Richardson*, 403 U. S. 672, 678 (1971), that

> "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication".

and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971). It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson* v. *Board of Education*, 330 U. S. 1 (1947), the allocation procedure for free books in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz* v. *Tax Commission of the City of New York*, 397 U. S. 644 (1970).[2] If, as the Supreme Court pointed

[2] This language is borrowed substantially from *P. O. A. U.* v. *Essex*, 28 Ohio State 2d 79 (1971).

out in *Allen, supra* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso*, 403 U. S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guildelines established by the Supreme Court in *Lemon-Earley* where it said (at page 616) that its "decisions from *Everson* [*supra*] to *Allen* [*supra*] have permitted the States to provide church-related schools with secular neutral, or nonideological services, facilities, or materials."

Accepting, as I believe we must, the basic promise that no perfect or absolute separation between religion and government is really possible, see *Walz* v. *Tax Commission of the City of New York, supra,* at 670, I agree partly with the views of Judge Oakes very recently expressed in the case of *Americans United for Separation of Church and State* v. *Oakey* (D. Vt., No. 6393, March 6, 1972) that we should "search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

I would hold that this statute neither on its face nor as applied by the defendants is unconstitutional, and I would dismiss the complaint on the merits.

EDMUND L. PALMIERI,
U. S. D. J.

Dated: April 27, 1972.

APPENDIX "C"

Order and Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York and EDWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants.

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70 Civ. 3251.

U. S. District Court
Filed
Jun 1 1972
S. D. of N. Y.

This action having come on to be heard on the merits before the Court, the Honorable PAUL R. HAYS, Circuit Judge, the Honorable EDMUND L. PALMIERI and the Honorable MORRIS E. LASKER, District Judges for the Southern

District of New York, and after hearing arguments of counsel, the Court having rendered an opinion dated April 27, 1972, it is hereby

ORDERED AND ADJUDGED

1. That the defendants' motion to dismiss the complaint is denied.

2. Chapter 138 of the Laws of the State of New York of 1970 is hereby declared to be unconstitutional in violation of the First Amendment of the United States Constitution.

3. The defendants and their agents and all persons acting for or on behalf of the State of New York are permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools.

4. The order and judgment of the Court filed on the 19th day of May, 1972, is hereby vacated.

Dated: New York, New York, June 1, 1972

PAUL R. HAYS
Circuit Judge

MORRIS E. LASKER
District Judge

Judgment entered 6/1/72.

JOHN LIVINGSTON

APPENDIX "D"

Notice of Appeal to the Supreme Court of the United States

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD M. SQUADRON,

Plaintiffs,

against

ARTHUR LEVITT, as Comptroller of the State of New York and EDWALD B. NYQUIST, as Commissioner of Education of the State of New York,

and

Defendants,

CATHEDRAL ACADEMY, Albany New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hills, New York, and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenors-Defendants.

---

70 Civ. 3251.

Notice is hereby given that Arthur Levitt, as Comptroller of the State of New York, and Ewald M. Nyquist, as Commissioner of Education of the State of New York, the de-

fendants above-named, hereby appeal to the Supreme Court of the United States from the final order and judgment entered in this action on June 1, 1972, holding Chapter 138 of the New York Laws of 1970 unconstitutional as constituting an establishment of religion in violation of the First Amendment to the Constitution of the United States, and granting a permanent injunction restraining the payment of funds to nonpublic schools pursuant to that chapter, and defendants appeal from each and every part of said order.

This appeal is taken pursuant to 28 U. S. C. § 1253.

Dated: Albany, New York, June 7, 1972.

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
By JEAN M. COON
Assistant Solicitor General
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Appendix "D"—Notice of Appeal

To:

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APPENDIX "E"

Chapter 138

An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor.

Approved April 18, 1970, effective July 1, 1970.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Non public schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, exam-

ination and other administrative services of the schools which these children attend in fulfillment of the above state purposes are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base

year, except that the commissioner may disregard such reduction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid required for such base year by virtue of the failure to main-

tain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a non-profit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid on or before March fifteenth of such year, and the second to consist of the balance and to be paid on or before May fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated

for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars ($28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect July first, nineteen hundred seventy.